SUPREME COURT, U. S.

No. 74-554

Supreme Court, U.
FILED
NOV 7 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

ARCHIE ALLEN PARRIGAN, *Petitioner*

v.

COMMONWEALTH OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF DICKENSON COUNTY, VIRGINIA

FREDERICK W. ADKINS
DONALD E. EARLS

CLINE, MCAFEE, ADKINS
& GILLENWATER
Attorneys at Law
1022 Park Avenue, N. W.
Norton, Virginia

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Reasons for Granting the Writ	4
Conclusion	7
Appendix A	1a
Appendix B	7a

CITATIONS

Cases:

Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972)	4
Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)	4, 6
Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1960)	4
United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)	5

Constitution and Statutes:

28 U.S.C. 2104	2
Constitution of the United States:	
Fifth Amendment	2, 6
Fourteenth Amendment	2, 6

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 52(b)	4, 7
Appendix A	1a
Appendix B	7a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

ARCHIE ALLEN PARRIGAN, *Petitioner*

v.

COMMONWEALTH OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF DICKENSON COUNTY, VIRGINIA

Frederick W. Adkins, attorney, on behalf of Archie Allen Parrigan, petitions for a Writ of Certiorari to review the judgment of the Circuit Court of Dickenson County, Virginia in this case.

OPINIONS BELOW

The opinion of the Circuit Court of Dickenson County (App. A, infra, p. 1a) is unreported. The opinion and order of the Supreme Court of Virginia (App. B, infra, p. 7a) is unreported.

JURISDICTION

The judgment and decision of the Supreme Court of Virginia was entered on June 10, 1974 and overturned the decision of the Circuit Court of Dickenson County, Virginia and ordered the Petitioner to return to the State Penitentiary. The time for filing a petition for a writ of certiorari was extended to and including November 7, 1974. The jurisdiction of this Court is invoked under 28 U. S. C. Section 2104 et seq.

QUESTION PRESENTED

Was the defendant, Archie Allen Parrigan, denied due process of law under the Fourteenth Amendment due to the circumstances of the identification made by Rufus H. Yates, a prosecuting witness and was such identification so unnecessarily suggestive and conducive to irreparable mistaken identification as to deprive the petitioner, Archie Allen Parrigan, due process of law and require the exclusion of the in-court identification evidence adduced by the prosecuting witness, Rufus H. Yates?

STATEMENT

On June 18, 1969, Archie Allen Parrigan was convicted by a jury in Dickenson County of robbery and he was sentenced to confinement in the Virginia State Penitentiary for a period of twenty years. The petitioner then filed in the Circuit Court of Dickenson County a petition for a Writ of Habeas Corpus alleging he was unlawfully detained by the respondent, the Superintendent of the Virginia State Penitentiary. After an evidentiary hearing, the Circuit Court of Dickenson County, in a Memorandum Opinion, held: "The only reasonable conclusion to be drawn from the facts in this case is that the confrontation, whether it

be called a show-up or line-up, of Archie Allen Parrigan, by Yates, was so impermissibly suggestive and conducive to irreparable mistaken identification as to deprive Archie Allen Parrigan of his Fifth and Fourteenth Amendment guarantees to due process of law."

Dickenson County Deputy Sheriff, Julius Stanley, approached the Petitioner, Parrigan, in the City Cafe in Clintwood, Dickenson County, Virginia, and asked him to ride to Haysi, a distance of about twenty miles. The facts are in conflict as to whether or not the petitioner agreed to this trip. The facts are undisputed, however, that Officer Stanley had an arrest warrant for the Petitioner in his pocket at the time the trip was made, but did not show the warrant to the Petitioner, nor did he advise him of his constitutional rights. Rufus H. Yates, the prosecuting witness, who later made a positive in-court identification of the Petitioner, was brought some twenty miles from an adjoining county by taxi to the same cafe in Haysi. Yates was brought into the cafe where Officer Stanley and Parrigan were seated alone in a booth. The officer was in uniform and the Petitioner testified that the officer asked Yates if this was one of the boys or doesn't this look like the man. Yates admitted that he had consumed some five or six beers prior to the incident for which the petitioner was convicted. Yates specifically identified the Petitioner, Archie Allen Parrigan, as one of the three men who robbed him on February 15, 1969, for which two other co-defendants pleaded guilty, neither having implicated the Petitioner, Archie Allen Parrigan. No objection was raised to the suggestiveness of any earlier identification nor was any mention made of the pre-trial identification procedure at the Circuit Court trial. The Supreme Court of

Virginia held that the Petitioner could not raise the question of the identification for the first time on a Writ of Habeas Corpus. As pointed out in the Virginia Supreme Court's Opinion, a Writ of Error had previously been denied the Petitioner in this case, and should this Court find that the constitutional rights of the Petitioner were violated by the in-court identification, then, under Rule 52(b) of the Federal Rules of Criminal Procedure such plain error or defect affecting the substantial rights of Archie Parrigan may be corrected by this Court.

REASONS FOR GRANTING THE WRIT

This Court has on numerous occasions held that the due process clause of the Fifth and Fourteenth Amendments forbids a line-up that is unnecessarily suggestive and conducive to irreparable mistaken identification. *Kirby* v. *Illinois,* 406 U.S. 682, 691, 92 S. Ct. 1877, 1883, 32 L. Ed. 2nd 411 (1972).

Similarly this Court has held that each case must be considered on its own facts and the identification procedure must be so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons* v. *United States,* 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2nd 1247 (1968) quoted in *Neil* v. *Biggers,* 409 U.S. 188, 198, 93 S. Ct. 375, 381, 34 L. Ed. 2nd 401 (1972).

The record of the hearing held on the Petition for the Writ of Habeas Corpus on September 9, 1971, clearly shows that plain error or defects affecting substantial rights were made at the trial of the Petitioner and under Federal Rules of Criminal Procedure, Rule 52(b), such plain errors or defects affecting substantial rights may be noticed although they were not brought

to the attention of the Court. When the Virginia Supreme Court ruled that such matter could not be first brought on the Writ of Habeas Corpus it overlooked the fact that Archie Parrigan's constitutional rights had been violated, even though this matter had not been brought to the attention of the trial court. It would have been impossible for Parrigan to have brought such matter to the attention of the court, since there is no indication in the record that Parrigan was aware that such rights had been violated. When Rufus Yates first identified the Petitioner in Club 83, some twenty miles from where the Petitioner was taken by the investigating officer, Deputy Sheriff Stanley, the record clearly indicates that Yates had been told to appear at the cafe, which was the same cafe from which the prosecuting witness had been taken prior to the commission of the crime for which the Petitioner was convicted. Once the opinion of Yates became tainted, any in-court identification by him was just as likely to be incorrect, for the identification would relate back to the prior meeting in the cafe, where Yates had the opportunity to view the Petitioner at some length and for the specific purpose of remembering him, rather than at the time he had been allegedly robbed.

The record indicates that the Petitioner was in a booth with Deputy Sheriff Stanley when the prosecuting witness entered the cafe for the purposes of making identification. Just as in *United States* v. *Wade,* 388 U.S. 218, 234, 87 S. Ct. 1926, 1936, 18 L. Ed. 2nd 1149 (1967), "It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police" than having the victim of a crime return to the scene of the crime for the purpose of identifying a suspect

and have that person sitting in a booth with a deputy sheriff in uniform. Certainly Yates' identification of the Petitioner was at that time crystallized for future reference at the trial. This Court stated in *Neil* v. *Biggers,* that "suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." 409 U.S. 188, 198, 93 S. Ct. 375, 382, 34 L. Ed. 2nd 401 (1972). The record in this case indicates that a full line-up or a usual police station line-up could have been had and that Yates could have participated and viewed such line-up rather than stage a show-up at the scene of the alleged crime at a time when the Deputy Sheriff, in uniform, had an arrest warrant for the Petitioner in his pocket. At no time during the proceedings was the argument raised that the prosecution would have been prejudicially delayed by a proper confrontation, nor is there any evidence which would justify a conclusion that a proper line-up procedure would have impeded legitimate law enforcement. At the trial of the Petitioner, without the in-court identification by Yates, the Court would have been compelled to sustain a motion by the attorney for the defendant to strike the evidence. Without the identification by Yates, there was no evidence introduced in the trial of the Petitioner to even raise a suspicion of guilt.

The decisions by this Court indicate that the identification made of the Petitioner, Archie Allen Parrigan, substantially violated his Fifth and Fourteenth Amendment rights, due to the suggestive and conducive to irreparable mistaken identification made by the prosecuting witness Yates. Where such error in allowing

the impermissibly conducive identification affects the Petitioner's substantial rights, the Federal Rules of Criminal Procedure 52(b) is the only method available to permit such rights to be exercised.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FREDERICK W. ADKINS
DONALD E. EARLS

CLINE, MCAFEE, ADKINS
& GILLENWATER
Attorneys at Law
1022 Park Avenue, N. W.
Norton, Virginia

APPENDIX

APPENDIX A

VIRGINIA

IN THE CIRCUIT COURT OF DICKENSON COUNTY

Case No. 4285

ARCHIE ALLEN PERRIGAN, *Petitioner*

v.

J. D. COX, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY, *Respondent*

Opinion

SUMMARY OF FACTS

On February 15, 1969, Rufus H. Yates was the victim of an armed robbery allegedly committed by the petitioner, Archie Allen Perrigan, and two other co-defendants, both of whom plead guilty to the crime, but neither having implicated Archie Allen Perrigan. Two or three days after the offense Deputy Sheriff Julius Stanley approached Perrigan in the City Cafe in Clintwood and asked him to ride to Haysi, a distance of about 20 miles, to which request the petitioner agreed (HCTR 5). Officer Stanley had an arrest warrant in his pocket at the time but did not show the warrant to petitioner or advise him of his constitutional rights (HCTR 6). The victim was brought some 20 miles from an adjoining county by taxi to the same cafe in Haysi. The victim was brought into the cafe where Officer Stanley and Perrigan were seated alone in a booth (HCTR 47). The officer was in uniform at the time (TR 47). The victim was told the officer had somebody and wanted to know if he could identify the subject (HCTR 46-47). The petitioner testified that the victim was brought into the cafe by the taxi driver and Sheriff Stanley asked him if this is one of the boys or doesn't this look like the man (HCTR 32). The crime occurred about 3 A.M. in the morning and the victim admitted he had consumed five or six beers prior to

the incident (HCTR 44). The victim specifically identified the petitioner, Archie Allen Perrigan, as one of the three men who robbed him on February 15, 1969, when petitioner was tried in the Circuit Court of Dickenson County before a jury on June 18, 1969 (Trial Transcript 6-7, 9, 14). The petitioner was represented by counsel at the trial and the victim's in-court identification of petitioner was not objected to at that time. No objection was raised to the suggestiveness of any earlier identification nor was any mention made of a pretrial identification procedure. The jury found the defendant guilty of armed robbery and fixed his punishment at 20 years in the State Penitentiary. The case is now before this Court on a Petition for a writ of habeas corpus.

Question Presented

Were the circumstances under which Rufus H. Yates, the victim, identified Archie Allen Perrigan, the defendant, so unnecessarily suggestive and conducive to irreparable mistaken identification as to deprive defendant of due process of law under the Fourteenth Amendment, and to require the exclusion of the in-court identification evidence of Yates?

Opinion

At the outset it should be noted that this case did not unduly alarm the Court until the recent decision of *Kirby* v. *Illinois*, 40 L.W. 4607, 32 L. Ed. 2d —, 11 CrLr 3072, (June 7, 1972). In fact the Court prior to the *Kirby* decision felt that the petitioner was entitled to a reversal of the conviction and a new trial because of the denial of his Sixth and Fourteenth Amendment right to counsel (*Powell* v. *Alabama*, 277 US 45; *Johnson* v. *Zerbst*, 304 US 458; *Hamilton* v. *Alabama*, 368 US 52; *Gideon* v. *Wainwright*, 372 US 335; *White* v. *Maryland*, 373 US 59; *Massiah* v. *United States*, 377 US 201; *United States* v. *Wade*, 388 US 218; *Gilbert* v. *California*, 388 US 263; *Coleman* v. *Alabama*,

399 US 1); because of the denial of his Fifth and Fourteenth Amendment right against compulsory self-incrimination, *Mirando* v. *Arizona,* 384 US 4361, and because of the denial of due process under the Fifth and Fourteenth Amendments forbidding a line-up that is unnecessarily suggestive and conducive to irreparable mistaken identification, *Stovall* v. *Denno,* 388 US 293; *Foster* v. *California,* 394 US 440. Although not wholly in agreement with *Kirby,* supra, this Court is of the opinion that the denial of the right against compulsory self-incrimination and the denial of the right to counsel is now a moot question, having been settled by *Kirby,* and the only question now before the Court is whether or not the petitioner herein was denied due process of law under the Fifth and Fourteenth amendments forbidding a line-up that is unnecessarily suggestive and conducive to irreparable mistaken identification.

In this case the Court finds that the Due Process Clause of the Fifth and Fourteenth Amendment forbidding such line-ups which are unnnecessarily suggestive was violated and that the conviction should be reversed and a new trial granted.

Dean Parham H. Williams of the University of Mississippi Law School and on the faculty of the American Academy of Judicial Education of the University of Alabama, emphasizes the importance of applying the "impermissably suggestive" test in all line-up or show-up cases. In the case at hand the victim was told he was being taken to a cafe where an officer had someone for him to try to identify and upon arrival the uniformed officer asked the victim if this is one of the boys or doesn't this look like the man and at that time Perrigan and the officer were the only parties together in the booth. How could this have been more suggestive? And after having made the identification under these circumstances it would indeed be a rare individual who would come into Court later and say he was mistaken in the identification.

Another weakness in the identification made by the victim is found in the circumstances of the actual crime. The crime occurred about 3 A.M. in the morning on a country road strange to the victim and naturally at a time when the victim was terrorized. Also, the victim was intoxicated, having consumed five or six beers by his own admission. The victim was illiterate. These factors point up the inability of the victim to clearly identify the perpetrator of the crime.

The Court in *Kirby* recognized the fact that occasions do arise when the police abuse identification procedures and in the last paragraph of that decision used the following language:

> "What has been said is not to suggest that there may not be occasions during the course of a criminal investigation when the police do abuse identification procedures. Such abuses are not beyond the reach of the Constitution. As the Court pointed out in *Wade* itself, it is always necessary to "scrutinize *any* pretrial confrontation . . ." 388 U.S., at 227. The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall* v. *Denno*, 388 U.S. 293; *Foster* v. *California*, 394 U.S. 440. When a person has not been formally charged with a criminal offense, Stovall strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime."

Counsel for petitioner in a memorandum dated June 30, 1972, aptly set out the reasons why *Kirby* is inapplicable herein:

> "The Court, in *Kirby* v. *State of Illinois*, limits its determination to whether the per se exclusionary rule of Wade—Gilbert is applicable to pre-indictment confrontations, concluding that the Sixth Amendment guarantee of the right to counsel does not exist until

the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment information, or arraignment.

While the holding of the Court is that the right to counsel does not attach until at or after formal charge, it seems fair to interpret the decisions thusly: that the Sixth Amendment guarantees to a defendant the right to counsel at or after formal charge, at or after the initiation of adversary judicial criminal proceedings. It is interesting to note that in the *Wade* case the confrontation took place *after* an attorney had been appointed, but without the presence of the attorney and without notice to him. In this respect the *Kirby* decision may be considered to broaden, or, at least, clarify the *Wade* decision. The *Kirby* decision definitely fixes the time when a defendant is entitled to counsel—at or after the initiation of adversary judicial criminal proceedings.

It is certainly debatable what the United States Supreme Court would decide as to whether Archie Allen Parrigan's right to counsel had arisen at the time of his confrontation with Yates. The Sheriff's deputy had a warrant for the arrest of Archie in his pocket, transported Archie fifteen miles and kept Archie in his custody for an hour prior to the showup. If Deputy Stanley had served the warrant prior to the confrontation, then a formal charge would have been made. That is, adversary judicial criminal proceedings would have been initiated, and the *Kirby* decision would apply. It is interesting to note that under the law of Virginia, after a warrant of arrest charging the commission of a felony, a Sheriff is required to arrest. Deputy Stanley's duty to arrest Archie arose prior to any confrontation with Yates. It is felt by this writer that the United States Supreme Court would not allow the deceit by Stanley to deprive Archie Allen Parrigan of so important a safeguard of his constitutional rights.

In the Memorandum of Opinion on Behalf of Petitioner heretofore filed in this case, the argument does not turn on defendant's right to counsel, but rather on a defendant's right to due process of law guaranteed by the Fifth and Fourteenth Amendments. The Court

in *Kirby* specifically did not determine whether the defendant had been deprived of due process of law. . . .

I conclude that the decision of the *Kirby* case is, generally, inapplicable to the proper disposition of the case against Archie Allen Parrigan. The *Kirby* decision limits itself to when a defendant's right to counsel originates. The issue in the instant case is whether the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification so as to deprive Archie Allen Parrigan of due process of law."

In conclusion the Court finds the only reasonable conclusion to be drawn from the facts in this case is that the confrontation, whether it be called a showup or a lineup, of Archie Allen Parrigan by Yates was so impermissably suggestive and conducive to irreparable mistaken identification as to deprive Archie Allen Parrigan of his Fifth and Fourteenth Amendment guarantees to due process of law.

The Attorney General is directed to prepare an appropriate order consistent with this Opinion.

This 25th day of August, 1972.

/s/ GLYN R. PHILLIPS
Glyn R. Phillips, Judge, 27th
Judicial Circuit of Virginia

APPENDIX B

FROM THE CIRCUIT COURT OF DICKENSON COUNTY

Glyn R. Phillips, Judge

Opinion by Justice Lawrence W. I'anson
Richmond, Virginia, June 10, 1974

Record No. 730270

A. E. SLAYTON, JR., SUPERINTENDENT
OF THE VIRGINIA STATE PENITENTIARY

v.

ARCHIE ALLEN PARRIGAN

Present: All the Justices

On June 18, 1969, Archie Allen Parrigan was convicted by a jury on an indictment charging him with robbery, and he was sentenced by the trial court in accordance with the jury's verdict to confinement in the State penitentiary for a period of twenty years. We denied his petition for a writ of error to the judgment of conviction.

On February 8, 1971, Parrigan, petitioner herein, filed in the court below a petition for a writ of habeas corpus, which was later amended, alleging that he was unlawfully detained by the respondent, the Superintendent of the Virginia State Penitentiary. He averred that his court-appointed attorney was ineffective, that his pretrial identification was impermissibly suggestive, and that it tainted his in-court identification.

After an evidentiary hearing the trial court, in a memorandum opinion, held as a fact that petitioner was effectively represented by his court-appointed attorney, but the court awarded petitioner a writ of habeas corpus, set aside his conviction, and ordered a new trial solely on the ground that petitioner's pretrial identification was impermissibly suggestive. We granted the respondent a writ of error to this judgment.

The sole issue on this appeal is whether the petitioner has standing in a habeas corpus proceeding to attack an alleged impermissibly suggestive pretrial identification as tainting the in-court identification when he did not present that defense at his criminal trial and upon appeal from that conviction.

The record in Parrigan's trial on the robbery charge shows that about 6 p.m. on February 14, 1965 Rufus Hawkins Yates entered Club 83 in Haysi, Virginia. While waiting for his ride home, he consumed five or six beers. During his wait three men arrived at the club and subsequently offered him a ride home. Yates consented to go with them. After the car was stopped at a place unknown to Yates, he was robbed of $340. At trial, Yates positively identified Parrigan as one of the three men who robbed him. Two other witnesses identified Parrigan as having been in Club 83 on the night of the robbery. One of these witnesses further testified that Parrigan was a member of the trio who offered Yates a ride home that night.

Parrigan presented an alibi defense which was rejected by the jury's verdict of guilty.

At petitioner's habeas corpus evidentiary hearing, it was revealed for the first time that shortly after the Yates robbery Deputy Sheriff Stanley had Parrigan accompany him to Haysi. When they arrived, Stanley advised Parrigan that he wanted to see whether he (Parrigan) could be identified by a robbery victim. Sometime after both men entered Club 83, Yates, the robbery victim, appeared at the club.

Yates testified that Stanley requested him to look around the club to see if he could identify any of the persons who robbed him. He first looked into the back room of the club and then in the main room. He identified Parrigan, who was sitting in a booth with Stanley in the main room, as one of the men.

Parrigan testified that he and Stanley were sitting in a booth when Yates identified him as one of the robbers; and that Stanley said to Yates: "Isn't this one of the boys?" or "Does this look like the man?" Parrigan said that he did not tell his attorney of this pretrial identification.

We agree with the respondent's contention that the petitioner lacked standing to raise on habeas corpus the question whether his in-court identification by Yates was tainted by an impermissibly suggestive pretrial identification when he did not advance that defense at his trial and upon appeal from that conviction.

Assuming, without deciding, that petitioner was subject to an unconstitutional identification procedure,[1] the court below erred, absent a showing of ineffective assistance of counsel in failing to raise that question, in permitting inquiry on this question for the first time in the habeas corpus proceeding.

We have repeatedly held that under Rule 1:8, now Rule 5:7, an objection requiring a ruling of the trial court must be made during trial when identification testimony is offered or it will not be noticed upon appeal. *Poole* v. *Commonwealth*, 211 Va. 258, 260, 176 S.E.2d 821, 823 (1970); *Henry* v. *Commonwealth*, 211 Va. 48, 52, 175 S.E.2d 416, 419 (1970).

A petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error. *Brooks* v. *Peyton*, 210 Va. 318, 321-22, 171 S.E.2d 243, 246 (1969); *Smyth* v. *Bunch*, 202 Va. 126, 131, 116 S.E.2d 33, 37-38 (1960).

It is true we said in *Griffin* v. *Cunningham*, 205 Va. 349, 355, 136 S.E.2d 840, 845 (1964): "It is well settled that the deprivation of a constitutional right of a prisoner may be raised by '*habeas corpus.*'" But in the interest of the final-

---

[1] *See Stovall* v. *Denno*, 388 U.S. 293, 301-02 (1967); *Neil* v. *Biggers*, 409 U.S. 188, 196-99 (1972).

ity of judgments and since the original function of the writ of habeas corpus was to provide an inquiry into jurisdictional defects,[2] we hold that the principle enunciated in *Griffin* is inapplicable when a prisoner has been afforded a fair and full opportunity to raise and have adjudicated the question of the admissibility of evidence in his trial and upon appeal. *See Powell* v. *State*, 244 So.2d 746 (Fla. App. 1971); *People* v. *Ward*, 48 Ill.2d 117, 120-21, 268 N.E.2d 692, 695 (1971); *In re Terry*, 4 Cal.3d 911, 926-27, 484 P.2d 1375, 1378, 95 Cal. Rptr. 31, 43, *cert. dismissed*, 404 U.S. 980 (1971); *In re Sterling*, 63 Cal.2d 486, 488-89, 407 P.2d 5, 7-8, 47 Cal. Rptr. 205, 207-08 (1965); *State* v. *White*, 274 N.C. 220, 232, 162 S.E.2d 473, 480 (1968). *See also* concurring opinion of Mr. Justice Powell in *Schneckloth* v. *Bustamonte*, — U.S. —, 93 S.Ct. 2041, 2059 (1973); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv.L.Rev. 441 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 160 (1970).

The trial and appellate procedures in Virginia are adequate in meeting procedural requirements to adjudicate State and Federal constitutional rights and to supply a suitable record for possible habeas corpus review. A prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction. Since the issue of the alleged constitutionally improper pretrial identification could have been raised and adjudicated at petitioner's trial and upon his final judgment of conviction by habeas corpus.

For the reasons stated, the judgment of the court below is

Reversed, the petition is dismissed, and the judgment of conviction is reinstated.

---

[2] *Brooks* v. *Peyton*, *supra*, 210 Va. at 321, 171 S.E.2d at 246.